No. 77-654

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 557 F. 2d 971. The opinion of the Federal Trade Commission (A. 1193a-1235a; excerpts at Pet. App. 35a-57a) is reported at 87 F.T.C. 962, 1047-1073. The decision of the administrative law judge (A. 1067a-1192a) is reported at 87 F.T.C. 962, 967-1046.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. A petition for rehearing was denied on August 8, 1977 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on November 7, 1977, and was granted on March 20, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a buyer who knowingly induces and receives a discriminatory price substantially below any competitive offer is shielded from liability under Section 2(f) of the Robinson-Patman Act because the seller offering the lower price may have submitted its bid in a good faith effort to meet competition.

2. Whether, in connection with petitioner's asserted cost justification defense, the Federal Trade Commission properly applied the evidentiary standards set forth by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61.

STATEMENT

Petitioner ("A & P") operates a chain of grocery stores. The Federal Trade Commission found (Pet. App. 39a-55a) that under an agreement with Borden, Inc., concluded in November 1965, A & P knowingly induced and received discriminatory prices on milk and other dairy products, in violation of Section 2(f) of the Robinson-Patman Act, 15 U.S.C. 13(f).[1] The

[1] The Robinson-Patman Price Discrimination Act of 1936, 49 Stat. 1526, substantially amended Section 2 of the Clayton

Commission ordered A & P to cease and desist from inducing or accepting unlawfully discriminatory prices in the purchase of such products (Pet. App. 56a), and the court of appeals affirmed (Pet. App. 1a-32a). A & P now challenges that decision.

A. The Negotiations and Agreement

In late 1964, A & P headquarters in New York instructed A & P divisional purchasing officials to investigate the possibility of obtaining reduced prices by switching from brand label milk (*i.e.*, milk bearing a processor's label) to private label milk (*i.e.*, milk bearing the retailer's name or brand) (A. 198a-199a, 294a-296a, 1077a).[2] A & P's Chicago Unit, then a part of the Company's Middle Western Division,[3] contained more than 200 stores in Illinois, Indiana, and Iowa (A. 1071a). Chicago Unit Head Buyer Elmer Schmidt invited Borden to submit a private label offer for the Chicago area, where Borden had served A & P since the late 1950s (A. 1077a, 1079a, 1198a).

Act, 38 Stat. 730. The resulting version of Section 2 is commonly referred to as Section 2 of the Robinson-Patman Act, and that usage is followed here.

[2] In the version of this brief filed in page proofs under this Court's Rule 34(5), the abberviation "FF" was used to refer to the administrative law judge's findings of fact, and relevant testimony in the Commission's hearing transcript was cited by the witness's name followed by the appropriate page number(s). All these citations have been converted to appendix citations in this final version of the brief.

[3] In 1969 A & P abolished the unit-division organizational structure, and the Chicago Unit became one of 32 operating divisions (A.1071a, 1072a-1073a).

Shortly before A & P requested the private label bid, Borden had opened a new dairy processing plant in Woodstock, Illinois (A. 1076a). The new plant, designed to increase Borden's capacity, had been constructed at an investment of more than $5 million (A. 566a, 899a-912a, 1082a).[4] A & P's business represented more than 55 percent of Borden's wholesale route sales in the Chicago area and more than 25 percent of the Woodstock plant's potential production (A. 686a, 1081a-1082a).[5]

Borden officials feared that, if Borden granted lower private label prices to A & P, A & P might reduce retail private label prices below existing retail prices for advertised brand label milk. Borden thought that this would be undesirable (A. 1081a-1082a, 1227a-1228a). Despite this concern, however, Borden believed that retention of A & P's business was essential to the efficient operation of the Woodstock plant (A. 555a-557a, 1079a, 1081a-1083a, 1085a-1086a, 1166a-1167a), and that loss of the A & P account would reduce annual gross profits by more than $1.6 million (A. 1084a, 1085a).[6] Borden was therefore "desperate" to keep A & P's business

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[4] In the page proof version of this brief, the abbreviation "CX" was used to refer to exhibits introduced by the Commission and the abbreviation "RX" to refer to exhibits introduced by A & P (respondent at the administrative hearing). These citations have now been converted to appendix citations.

[5] The Woodstock plant ultimately produced almost all of the private label products sold to A & P (A. 1075a).

[6] The administrative law judge apparently used the term "gross profits" to refer to the amount by which sales exceeded

(A. 1085a-1086a, 1124a), and the president of Borden's Chicago Central District told A & P's representative Schmidt that Borden "could not lose" the A & P account (A. 1086a).

Accordingly, during the period from November 1964 to August 1965 Borden made several private label offers to A & P. Borden successively increased the number of products to be covered by the private label program (A. 1079a-1084a). The August offer covered 11 milk and dairy items and applied to stores throughout A & P's Chicago Unit. The August offer would have permitted A & P to realize annual savings of $410,000 if it switched wholly to private label milk and continued to purchase the same volume (A. 643a-682a, 1084a). Because A & P's annual purchases from Borden were approximately $5.6 million (A. 1101a), this offer represented a reduction of some 7 percent.

During negotiations Borden submitted detailed cost data to A & P in connection with the various private label offers (A. 574a-641a). In its May 1975 offer Borden stressed to A & P that it expected almost no profit from the A & P contract, but that it was presenting such a bid because A & P's business was vital to Borden's efficient use of its Woodstock plant (A. 590a-597a, 1081a, 1082a-1083a).

Borden told A & P that some dairies in the area might submit bids that included only out of pocket

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labor costs and raw material costs. Capital costs, taxes, and other costs therefore must be subtracted from the $1.6 million figure in order to determine Borden's net profit in serving A & P.

or direct costs and omitted all fixed charges (A. 64a-65a, 108a-110a, 1084a, 1085a-1086a). In addition, Borden's Chicago Sales Manager said that he did not "see how anyone can sell any cheaper than Borden" (A. 109a-110a, 1085a). A & P was not satisfied. "[I]t hammered down Borden's successive bids and even when it was informed that the bid was at or close to Borden's costs put the matter up for outside bids" (A. 1101a; see also A. 1084a-1085a).

On August 31, 1965, Bowman Dairy Company submitted an offer that was substantially lower than Borden's August offer and would have produced annual savings of approximately $737,000 for A & P under conditions roughly similar to those offered by Borden (A. 687a-707a, 772a-773a, 1085a, 1089a).[7] Although it is not clear that A & P intended to give serious consideration to the Bowman bid,[8] A & P

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[7] The administrative law judge found that Bowman's offer was not a meaningful competitive bid because the prices quoted depended on certain unjustified assumptions concerning the volume A & P would purchase and the required delivery frequency in the Gary-Hammond area of Indiana (A. 1087a, 1108a-1109a, 1112a-1113a). The Commission reversed this finding and stated that the Bowman bid was genuine and comparable if adjusted "to make it responsive to A & P's true situation" (Pet. App. 43a and n. 17).

[8] The record contains some indication that, in light of its unsatisfactory prior relationship with Bowman, A & P would not have accepted the Bowman bid even if it had been the lowest (A. 1175a-1176a). A & P did not ask Bowman to provide a letter concerning the legality of the prices offered; it did ask Borden for such a letter (A. 1089a, 1109a). Moreover, A & P did not seek to clarify certain aspects of the Bowman bid that would have significantly affected its net costs (see note 12, *infra*).

notified Borden of the existence of a lower competitive offer and, contrary to its past practice, gave Borden the opportunity to rebid (A. 201a-202a). A & P told Borden only that Borden's most recent offer was "not even in the ball park" and that an improvement of $50,000 in the annual savings offered by Borden would "not be a drop in the bucket" (A. 109a-110a, 708a-709a, 1085a).[9]

Borden apparently made no effort to verify whether A & P had received a lower offer. Instead, Borden responded on September 8, 1965, by offering to submit a new quotation that would yield A & P an annual cost reduction of $820,000 (A. 1086a), or twice the savings of the August offer. Borden informed A & P that the offer was made "on the basis of meeting competition" (A. 71a, 72a-73a, 1086a). A & P told Borden that the revised offer was "in the ball park" and asked Borden to prepare a formal quotation spreading the $820,000 savings among the various products in Borden's dairy line (A. 72a-73a, 113a, 1086a).

Borden then submitted a new price proposal covering the 11 items previously offered under the private label program as well as glass gallons of whole milk and lowfat milk (A. 73a-74a, 115a-117a, 1087a). A & P's representative Schmidt rejected this offer on the ground that other bidders had not bid on glass

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[9] Although the parties, the court of appeals, and the Commission have quoted this statement as it appears in the uncorrected transcript (*i.e.*, "a drop in the pocket"), the findings of the administrative law judge quote the witness' actual testimony, as reflected in the corrected transcript.

gallons and that it would not be fair for Borden to allocate part of the $820,000 annual savings to those items (A. 73a-74a, 116a-118a, 1087a).[10] While Borden was preparing a corrected bid that would allocate all of the savings to the original 11 private label items, A & P urged Borden to make further price improvements, saying "sharpen your pencil a little bit because you are not quite there" (A. 117a-118a, 124a-125a, 1087a-1088a, 1151a-1152a, 1199a & n.3). Borden interpreted this to mean that its new offer was not quite as low as the competing offer in A & P's hands, and it consequently reduced its prices further (A. 118a, 124a-125a, 1087a). On the basis of the "sharpen your pencil"remark, the administrative law judge found that "A & P gave false price information to Borden as to Bowman's competing bid" (A. 1151a-1152a).

When Borden presented its final bid to A & P, the president of Borden's Central Division again stated that the offer was being made on a "meeting competition" basis. The Borden official explained to A & P's Schmidt (A. 76a, 1088a; see also A. 119a, 1088a):

> [T]here is certainly something here that I want you to very definitely understand. * * * This price is given to you by us on the feeling and belief that we are meeting a competitive bid.

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[10] The administrative law judge found that Bowman's bid had included glass gallons (A. 1078a). A & P simply did not wish to sell private label milk in glass containers because of the practical problems created by the need to collect deposits, make refunds, and store bottles (A. 257a-260a, 774a-775a).

> We know of no other way to justify this. You have to accept it on that basis. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this[:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else.

Schmidt replied (A. 76a, 1088a): "[Y]ou don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." Schmidt admitted that Borden told him on this and other occasions that the final bid was based on a perceived need to meet competition (A. 265a-266a, 268a, 1089a). Borden never gave A & P any reason to believe that its bid could be justified by any difference between the cost of serving A & P and the cost of serving other customers;[11] the Commission found that A & P was aware that there was no such justification (A. 1101a, 1103a-1105a).

A & P itself determined that Borden's offer was "substantially better" and "considerably more attractive" than Bowman's (A. 214a-215a, 304a-305a, 772a-779a, 841a-880a, 1089a, 1121a-1122a). Borden's final bid offered A & P nearly $83,000 in additional annual savings. Borden thus offered annual

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[11] The Commission found, moreover, that many stores competing with A & P were charged a higher price for Borden's milk products even though they bought in greater quantities than the individual A & P stores with which they were competing (A. 1216a).

savings approximately 11 percent greater than those offered by Bowman. The administrative law judge, the Commission, and the court of appeals all rejected A & P's contention that Bowman's offer was as good as or better than Borden's (A. 1112a, 1199a, 1210a & n.16; Pet. App. 4a-5a, 6a, 17a, 19a).[12]

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[12] A & P now attempts to reargue in this Court the relative merits of the Borden and Bowman bids (Br. 7 and n.10, 8 n.12, 10, 11 n.17).

For example, A & P maintains that its decision to accept the Borden offer was based in part on the erroneous assumption that that offer would yield annual savings of $880,000 rather than $820,000 (Br. 11-12 n.17). The record shows, however, that A & P was well aware that the $820,000 figure was the proper one to consider in weighing the Borden bid (A. 736a-737a, 774a-775a), and the administrative law judge found that A & P did consider the correct figure (A. 1089a).

A & P also cites testimony that the savings represented by Bowman's bid were understated by its own officials and the Commission because Bowman proposed to sell milk higher in butterfat content than Borden's milk (Br. 7 n.10). The witness on whom A & P relies (Bowman's General Manager in Chicago) also testified, however, that the Bowman offer did not contain butterfat specifications for a particular percentage (A. 479a-481a), and another witness testified that milk sold by Bowman during 1965 and early 1966 was actually lower in butterfat content than milk sold by Borden during the same period (A. 431a). The administrative law judge expressed "serious doubt that the Bowman bid actually called for 3.5 percent butterfat content" (A. 1124a-1125a); he found that the bid "was based upon a 3.5 percent butterfat content of the Class I raw milk and not the butterfat content of the processed milk" (*ibid.*). The judge also observed that A & P was not interested in butterfat content as long as the minimum legal requirements were met (A. 1124a). On the basis of this record, the Commission concluded that any difference in butterfat content would not have "greatly change[d] the dif-

A & P requested a letter from Borden stating that Borden's quoted prices were available to A & P's

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ference in prices" between Borden and Bowman (Pet. App. 43a n.18). Substantial evidence supports that conclusion.

A & P next contends that the Bowman bid was superior because, unlike Borden, Bowman would not have required A & P to preorder merchandise, would have sold its advertised brand at the same reduced prices offered for private label milk, and would have granted A & P comparable price reductions on dairy products not included within the group of 11 items covered by Borden's bid. As the administrative law judge found (A. 1107a-1108a), consideration of items not covered in the bids is improper because during the critical period in 1965 A & P evinced no interest in such items. Preordering was relatively unimportant because milk suppliers learn by experience the approximate needs of each store (A. 190a-196a). Furthermore, A & P fails to discuss two important respects in which Bowman's bid offered terms less favorable than Borden's; when the Commission adjusted the Bowman bid to take account of these differences, it concluded that "Borden's bid beats Bowman's by an even greater amount" (Pet. App. 43a). In particular, the prices offered by Bowman were dependent on a stated estimate of monthly sales volume and on a delivery schedule requiring deliveries only three days each week in the Gary-Hammond area of Indiana (A. 1108a-1109a; Pet. App. 43a; see note 7, *supra*). A & P's actual monthly purchases for its Chicago Unit totalled only approximately 75 percent of the volume expected by Bowman (A. 1108a-1109a); union contracts and prevailing practice required deliveries six days each week in the Gary-Hammond area (A. 1109a). The Bowman bid explicitly provided that prices would be adjusted if A & P's monthly order did not meet the assumed dollar volume or if labor costs were higher than anticipated (A. 687a-707a, 1108a-1109a). For these reasons, the Commission was justified in concluding that "the Borden bid was substantially better than the Bowman bid" (Pet. App. 43a).

Of course, the most important refutation of A & P's assertions is A & P's own acceptance of the Borden bid. A & P strains credulity when it argues that after months of hard bargaining it mistakenly accepted an inferior bid (Br. 11-13

competitors (A. 261a-265a, 1089a). Borden's response stated only that the quoted prices were "proper" and that Borden would defend them (A. 882a, 1217a). Although A & P's home office executive who reviewed the offer recognized that this letter did not meet A & P's request, he nonetheless approved acceptance of Borden's offer in October 1965 (A. 208a-209a, 220a-221a, 1089a).[13] Borden began serving A & P under the private label arrangement in November 1965 (A. 1089a). The next month Bowman went out of business, selling its assets to a large milk distributor (A. 476a).[14]

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and n.17; A. 218a-219a). The court of appeals correctly approved the Commission's findings that "Bowman's bid was in fact higher than Borden's" and that "A & P knew *for a fact* that the final Borden bid * * * beat the Bowman bid by a good margin" (Pet. App. 17a, 19a). These findings are supported by substantial evidence, and the questions presented by the petition (Pet. 2) do not include any challenge to the Commission's findings of fact. This Court therefore should reject A & P's invitation to engage in a factual review of the record. See *Berenyi* v. *Immigration Director*, 385 U.S. 630; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214.

[13] In an effort to explain his willingness to proceed without the usual letter of availability, the A & P executive testified that a Borden official in New York told him that the letter sent from Borden's Chicago office (A. 1217a; Pet. Br. 11) was a letter of availability and in fact was "more than a letter of availability" because it was intended to indicate that Borden would "hold A & P harmless" in connection with the private label prices (A. 208a-214a). No such meaning is apparent on the face of the letter, however, and the Borden official in question denied having made the statements attributed to him (A. 185a). The administrative law judge refused to credit A & P's version of these events (A. 1103a, 1121a-1122a).

[14] See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 601-602.

The Borden—A & P agreement entailed some reduction of services to A & P. Two months after the beginning of the private label service to A & P, Borden extended to other retail customers in the Chicago area the same limited service option (A. 1105a-1106a). The discounts offered to other customers electing reduced services were not as large as those given to A & P (A. 1097a, 1105a-1106a).[15] The administrative law judge found that the discriminatory prices received by A & P were between 6 percent and 22.5 percent lower than the prices paid by A & P's competitors (A. 1093a-1099a, 1183a-1192a).[16]

The administrative law judge determined that,

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[15] Although A & P does not contend that the prices it received were not discriminatory, it does cite testimony from Borden's chief negotiator to the effect that Borden would have sold private label milk to other customers on the same terms and conditions offered to A & P (Br. 11 n.15). Borden's negotiator also testified, however, that he did not know of any instance in which such an offer was actually made to another customer (A. 94a), and A & P has not identified any customer who received equally low prices from Borden. Moreover, as indicated above (see page 4, *supra*), Borden was not eager to encourage the sale of private label milk (A. 1081a-1082a, 1228a), and a Borden official testified that his superior told him not to use the A & P price in the solicitation of other accounts because the A & P price had been offered on a meeting competition basis only (A. 157a-158a, 159a-160a).

[16] A & P suggests (Br. 32 n.33) that it did not know the prices it received from Borden were lower than those at which Borden sold to other customers. This possibility, improbable as a matter of business reality, is contrary to the findings of the administrative law judge (A. 1091a-1101a), adopted by the Commission (A. 1205a-1209a), and affirmed by the court of appeals (Pet. App. 13a-15a).

compared to competitors that also chose Borden's limited service option, "the only benefit lost by A & P in connection with the private label contract was advertising" (A. 1106a). The cost of that advertising to Borden was insufficient to justify the difference between the prices offered to A & P and those offered to other limited service customers (*ibid.*).[17] Furthermore, the Commission concluded on the basis of the administrative law judge's findings (A. 1109a-1110a) that even in those instances where A & P did receive fewer services than other Borden customers, the service savings to Borden were not sufficiently great to justify the price discounts accorded to A & P (Pet. App. 41a, 48a).

The A & P—Borden contract provided that prices were subject to negotiated change to reflect increased costs. In May 1966, in response to an increase in labor and container costs, Borden approached A & P to negotiate an increase in its prices (A. 33a-34a, 148a-151a, 802a, 1090a). Although Borden stated that it had passed increased costs on to other customers in the form of higher prices,[18] A & P refused to accept private label price adjustments (A. 150a-

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[17] Indeed, a Bowman official testified that his company was willing to price private label and advertised label products identically because it could not justify *any* price difference on the basis of advertising cost differences (A. 458a). The official also stated that he had informed A & P of this fact (*ibid.*).

[18] The spring of 1966 saw milk price increases throughout the Nation. See Federal Trade Commission, *Economic Report on Milk and Bread Prices* (1966).

151a, 803a, 841a-1, 1090a). A & P accepted increases on Borden label products, but within a few months private label milk accounted for almost all of A & P's purchases from Borden (A. 835a, 1090a, 1121a). In March 1967, when Borden again asked A & P to accept the same price increases previously accepted by other customers, A & P finally agreed to a limited increase on private label products (A. 152a-157a, 813a-828a, 1090a, 1107a, 1219a). A & P took this step only after it had learned of the Commission's investigation of the private label deal with Borden (A. 1090a, 1175a-1176a). Even then, A & P agreed to an increase that was only some 60 percent of that already accepted by Borden's other customers (A. 1090a, 1107a).[19]

From November 1965 through February 1972 Borden's sales of 11 principal dairy items to A & P's Chicago Unit were approximately $5 million annually (A. 225a-226a, 842a, 1071a, 1101a). Although the $820,000 savings negotiated in 1965 amounted to a discount of some 14 percent from what it otherwise would have paid, A & P did not pass its private label savings on to its retail customers (A. 1100a, 1120a; see also A. 1227a).

B. The Commission's Proceedings

In 1971 the Commission issued a complaint alleging that A & P had induced or received unlawful dis-

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[19] After November 1965, A & P did not receive any offers from competing dairies, and consequently the differential treatment Borden gave to A & P during these price negotiations could not have been justified as necessary to meet competition.

criminatory prices from Borden, in violation of Section 2(f) of the Robinson-Patman Act, 15 U.S.C. 13(f).[20] After a full hearing, the administrative law judge issued an initial decision finding that A & P had violated Section 2(f) (A. 1067a-1192a). We have described above most of the important findings of fact.

The Commission adopted most of the administrative law judge's findings concerning A & P's violation and affirmed. The Commission found that Borden discriminated in price between A & P and A & P's competitors (A. 1206a-1207a), that the discrimination was injurious to competition (A. 1207a-1208a),

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[20] The complaint also included two other counts, neither of which is now at issue. One count alleged that A & P's failure to disclose to Borden that its final offering price was substantially lower than any competitor's price was an unfair act or practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45. The other count charged both A & P and Borden with violating Section 5 by combining to stabilize and maintain milk prices. The administrative law judge, finding insufficient proof of a price maintenance agreement, dismissed the latter count (A. 1166a-1168a, 1177a, 1182a), and the Commission affirmed (A. 1225a-1229a). With respect to the first count, the administrative law judge thought that, by failing to inform Borden that its final bid was substantially below Bowman's competing bid, A & P acted unfairly and violated Section 5 (A. 1113a-1115a, 1177a). The Commission disagreed and dismissed the first count of the complaint (Pet. App. 36a-39a). The Commission stated that, in its view, "[t]he imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and * * * contrary to the public interest" (Pet. App. 38a).

and that A & P "knew or should have known that it was a beneficiary of a price discrimination having the requisite harmful competitive effects" (A. 1209a).

The Commission then addressed the two affirmative defenses asserted by A & P. On the basis of its findings that "the Borden bid was substantially better than the Bowman bid" and that A & P had "contemporaneously concluded" as much (A. 1210a), the Commission determined that whether or not Borden could have defended a charge of price discrimination by showing that it gave the price in good faith to meet competition, A & P could not take advantage of Borden's defense, because A & P induced Borden's bid and knew of the bid's superiority (A. 1211a-1212a). Finally, the Commission found that complaint counsel presented sufficient evidence to satisfy the initial burden of establishing A & P's knowledge of the lack of cost justification for Borden's discriminatory prices. A & P in turn failed to present sufficient evidence to demonstrate either that it did not know about the lack of cost justification or that the prices were in fact cost justified (A. 1213a-1225a).[21]

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[21] The Commission entered a remedial order (Pet. App. 56a-57a) that A & P now characterizes as "drastic" (Br. 20). This hyperbole is unwarranted. The court of appeals considered and rejected A & P's challenges to the order (Pet. App. 30a-32a). A & P's petition for certiorari did not raise any question concerning the scope of the order (see Pet. 2), and it is now too late for A & P to challenge its terms. See Rule 40(1)(d)(2) of the Rules of this Court.

C. The Court of Appeals' Opinion

The court of appeals held that substantial evidence supports the Commission's findings that Borden's prices to A & P were substantially below the prices at which Borden offered and sold milk products to competitors of A & P, and that these price discriminations resulted in competitive injury (Pet. App. 13a-15a).[22] The court also upheld the Commission's finding that A & P knew or should have known that Borden had no legal justification for the lower price and thus that A & P was the beneficiary of an unlawful price discrimination (*id.* at 15a-16a).

The court held that the Commission properly rejected A & P's meeting competition defense (Pet. App. 17a-22a). Whether or not Borden made its final offer in a good faith effort to meet Bowman's competitive bid, the court said, "A & P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (*id.* at 19a; emphasis in original). Under these circumstances, the court concluded, the meeting competition defense, viewed from the buyer's perspective as properly required by *Kroger Co.* v. *Federal Trade Commission*, 438 F.2d 1372 (C.A. 6), certiorari denied, 404 U.S. 871, must fail.

Finally, the court of appeals held (Pet. App. 22a-30a) that the Commission correctly applied the evidentiary standards established by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346

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[22] See also note 12, *supra*.

U.S. 61. The court ruled that the Commission satisfied its obligations "to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified" (Pet. App. 26a). The court then agreed with the Commission that A & P's response to that evidence was insufficient to show either actual cost justification or lack of knowledge that Borden's prices could not be cost justified (*id.* at 23a-24a, 28a-30a).

SUMMARY OF ARGUMENT

I

A & P argues that the Commission may not find a buyer liable under the Robinson-Patman Act without also finding that a seller violated the statute. A & P contends that Borden offered its private label prices in a good faith effort to meet an equally low competitive bid and that Borden therefore is shielded from Robinson-Patman Act liability by the affirmative defense provided by Section 2(b) of the Act. In such a situation, A & P argues, a buyer that has induced and received a discriminatorily low price cannot be liable, even if it knows that the seller's prices were significantly lower than necessary to meet competition.

A & P is wrong. Where a seller's discriminatorily low price does not just meet competition but in fact beats the prices offered by other sellers, any Section 2(b) defense available to the seller must turn on the seller's good faith. In this case, Borden would not necessarily have been entitled to a good faith meet-

ing competition defense, because it made no attempt to verify the existence and terms of Bowman's competing offer. The Commission, however, assumed *arguendo* that Borden would have been able to establish such a defense and concluded nonetheless that A & P violated Section 2(f). This conclusion is correct because A & P knew the terms of the competing offers and thus could not have entertained its own good faith belief that Borden's private label price only met competition. A seller's good faith defense may not be transferred to a buyer where the buyer induced the seller's good faith belief and knows that belief to be false.

The legislative history of the Robinson-Patman Act supports this position. The Act was passed in 1936 to correct perceived abuses associated with the growth of chain stores, in particular, large grocery chains. Congress deliberately sought to narrow the "meeting competition" defense that had been provided years earlier in the Clayton Act. The new wording of Section 2(b) permits only price discriminations made "in good faith to meet an *equally low* price of a competitor" (emphasis added). Sellers asserting a defense under Section 2(b) may not offer a discriminatory price that intentionally beats competition. By the same token, buyers knowing that a discriminatory price substantially beats competition should not be able to benefit from a seller's good faith (but false) belief that the price only meets competition, especially where that belief has been induced by the buyer itself.

A & P contends that even if, in certain circumstances a seller's good faith meeting competition defense cannot be transferred to a buyer, that rule should apply only where the buyer has induced the seller's good faith belief through an affirmative misrepresentation. As the court of appeals correctly concluded, the principle that a buyer may not take advantage of a seller's good faith defense when the buyer knows the seller's beliefs are false need not be so limited. The critical factor is the buyer's knowledge, not its lying. But even if this Court should conclude that a misrepresentation is a prerequisite for buyer's liability where no seller has been found to have violated the Act, it still should uphold the Commission's decision because A & P engaged in misrepresentation. When Borden offered A & P private label prices that would have resulted in annual savings of $820,000 on A & P's Chicago purchases of milk and dairy products, A & P told Borden to "sharpen your pencil a little bit because you are not quite there" (see page 8, *supra*). This remark created the impression that Borden's prices were not yet as low as Bowman's, when in fact Borden's offer was already better than Bowman's by a substantial margin. The administrative law judge found that "A & P gave false price information to Borden as to Bowman's competing bid" (A. 1151a-1152a), and the Commission adopted that finding. If misrepresentation is a necessary element of A & P's liability, the record demonstrates that misrepresentation occurred.

II

A & P's second challenge to the Commission's decision is based on the evidentiary standards announced by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61. A & P argues that *Automatic Canteen* requires the Commission to make an initial showing that Borden's price discrimination was not cost justified; A & P then contends that the Commission failed to introduce sufficient evidence to carry this burden. Contrary to A & P's assertions, the Commission presented substantial evidence to show both that Borden's prices were not cost-justified and that A & P knew it.

Section 2(a) of the Robinson-Patman Act provides that discriminatory prices are not unlawful if they make "only due allowance" for cost savings achieved by a seller in serving a particular customer or customers. Section 2(b) provides that, once the Commission has proved a discrimination in price, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." In *Automatic Canteen* the Commission showed that a buyer had induced and received a discriminatory price; the Commission then argued that this showing alone was sufficient to impose on the buyer the burden of coming forward with evidence that the price was cost justified or that the buyer did not know it was not. This Court disagreed. In view of buyers' limited access to information regarding sellers' costs, the Court held that the Commission bears the initial burden of

introducing evidence that a buyer knew or should have known the discriminatory price it received could not be cost justified.

Automatic Canteen was thus a departure from the apparent command of the statutory language in Section 2(b). The Court stressed, however, that its holding was concerned only with the burden of coming forward with evidence and did not require any specific quantum of proof from the Commission. The Court further stressed that the Commission's burden under *Automatic Canteen* "should not be difficult" to carry (346 U.S. at 79). The Court explained that the Commission could make the necessary showing through the use of circumstantial evidence drawn from the buyer's trade experience, the size of the price discount as compared to the likely cost savings, and the seller's possible representations regarding the lack of cost justification.

The Commission in this case presented ample evidence to show that Borden's prices could not be cost justified and that A & P knew it. The Commission showed first that Borden told A & P its private label bid was offered on a meeting competition basis only and could not be justified on any other ground. The Commission also introduced cost figures that Borden provided to A & P during negotiations. These figures indicated that Borden's costs were almost identical to or higher than the prices at which it was offering milk to A & P. Third, the Commission submitted evidence that other customers who received the same limited service from Borden that A & P did never-

theless paid higher prices than A & P. Finally, the Commission established that Borden did not provide A & P with a requested letter stating that its private label prices were available to other customers.

After such a strong showing by the Commission, it is reasonable to require that A & P come forward with some evidence to rebut the Commission's case. Such a shift in the burden of producing evidence is not contrary to *Automatic Canteen*. The Court in that case did not seek to impose an impossible burden on the Commission, and the "[c]onsiderations of fairness and convenience" (346 U.S. at 78) that motivated the earlier decision support the result reached by the court of appeals here.

ARGUMENT

The Commission found that A & P knowingly induced Borden to give it a discriminatorily low price, a price not available to any other Borden customer. The Commission further found that the discrimination was not justified by any cost savings Borden experienced in serving A & P. Although in the court of appeals A & P raised numerous arguments and objections to the Commission's decision and order, the court rejected these arguments and affirmed the Commission's decision. Despite A & P's attempt to reargue the facts (see notes 12, 15, 16, *supra*), as the case comes to this Court it has been settled that A & P induced and received a discriminatorily low price, which harmed competition. A & P now relies entirely on the fact that Section 2(f) of the Robinson-

Patman Act, in providing that "[i]t shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section," allows buyers to defend by showing that the price discrimination was not "prohibited by this section" because the seller would have had a defense. See *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 70.

A & P first argues that Borden would have had a "meeting competition" defense. Section 2(b) of the Act permits a seller to rebut a prima facie price discrimination case by showing that his lower price was offered to a purchaser "in good faith to meet an equally low price of a competitor." A & P contends that, because Borden submitted its final bid in an effort to meet Bowman's competing bid, A & P's acceptance of Borden's offer cannot have been a knowing receipt of an unlawful discrimination in price, in violation of Section 2(f).

Second, A & P asserts a cost justification defense. Section 2(a) of the Act provides that price differentials are legal if they "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which certain commodities are sold or delivered to certain purchasers. A & P contends that, under the standards announced by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, *supra*, the Commission's evidence that Borden's private label prices were not cost justified was insufficient. We address these arguments in turn.

I

A BUYER CANNOT TAKE ADVANTAGE OF A SELLER'S POSSIBLE "MEETING COMPETITION" DEFENSE WHEN THAT DEFENSE TURNS ON A "GOOD FAITH" BELIEF BY THE SELLER THAT THE BUYER KNOWS TO BE FALSE

A. The Meeting Competition Defense Turns On The Good Faith Of The Party Asserting The Defense

1. The "meeting competition" defense established for sellers by Section 2(b) of the Act can be established in two ways. First, the seller may show that its price simply met an "equally low" price offered by a competitor. Second, the seller may show that its price, even if in fact lower than any competitive offer, was granted in a "good faith" belief that the price only matched an equally low price. See generally *United States* v. *United States Gypsum Co.*, No. 76-1560, decided June 29, 1978, slip op. 25-31, 34 n.32. Borden's price to A & P was found by the Commission to have been substantially lower than any other offer to A & P. A & P therefore cannot contend that Borden's price simply met Bowman's. A & P must rely on the second branch of the defense, the "good faith" standard that permits "a somewhat imperfect matching between competing offers" (*id.* at 34 n.32) in recognition of sellers' unavoidable lack of knowledge about the precise terms of offers received by buyers.

Although A & P attempts to create a contrary impression (Br. 20 and n.21, 24-25), it is far from clear that Borden could have established a "good

faith" meeting competition defense if it had been charged with price discrimination. Borden, despite its doubts that any competitor could offer a price lower than that contained in Borden's August 1965 offer, never made any attempt to verify the existence or probable terms of a competing offer (see page 7, *supra*). Although, as the Court held in *Gypsum*, inter-seller price verification is forbidden by the antitrust laws despite its potential usefulness in establishing a defense to charges of price discrimination, and Borden therefore could not have asked Bowman to confirm the terms of its offer to A & P, that does not mean that Borden was at liberty to offer a discriminatorily low price to A & P without making *any* attempt to verify that the price was necessary to meet competition. "[C]asual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not * * * be sufficient to make the requisite showing of good faith" (*Gypsum, supra*, slip op. 28), and the failure of a seller to attempt to verify a price is quite inappropriate where, as here, the seller has its doubts about the buyer's veracity.[23] Nevertheless, the Commission's

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[23] Neither the administrative law judge nor the Commission nor the court of appeals determined that Borden would have been entitled to a good faith meeting competition defense. Indeed, the administrative law judge and the Commission suggested that precisely the opposite might be the case (A. 1151a; Pet. App. 44a and n.19). The Commission stated (Pet. App. 44a n.19):

> We believe that it is very probable that Borden did *not* have such a [good faith meeting competition] defense. To have a meeting competition defense, the record must

rationale in this case does not depend on whether Borden could have made out a "good faith" meeting competition defense, and we therefore assume *arguendo* that, if Borden had been charged by the Commission with giving an unlawful price discrimination, it would have had a good defense.

2. A & P argues that, on this assumption, it must prevail because the buyer does not violate Section 2(f) unless the seller also violates the Act.[24] That argument does not take into account the nature of

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demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price * * *. As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs. * * * It should have asked A & P for more information about the competing bid. By not making the request, it was not acting prudently. * * *

[24] A & P argues that a finding by the Commission of seller's liability under Section 2(a) is a prerequisite to a finding of buyer's liability under Section 2(f), but it does not contend that the Commission was required to join Borden in the proceeding against A & P. Previous decisions of this Court establish that the Commission enjoys broad discretion in choosing the targets of its enforcement efforts, and the Commission acted within that discretion in deciding not to issue a complaint against Borden for a violation of Section 2(a). See *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* 346 U.S. at 79; *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 249-252; *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413. Should this Court agree with A & P that buyer's liability under Section 2(f) is derivative only, the appropriate relief would be remand to the Commission for a determination on the availability of a Section 2(b) meeting competition defense to Borden.

the "good faith" requirement of the meeting competition defense. The Act makes uniform prices to competing customers the rule, and discrimination is an exception that must be justified under strict standards. *Exxon Corp.* v. *Governor of Maryland*, No. 77-10, decided June 14, 1978, slip op. 10-15. The seller has the burden of showing its good faith if the sale in fact is at a price lower than any competing offer. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 759-760. The requirement of good faith "lies at the core of the meeting-competition defense" (*Gypsum, supra*, slip op. 29); without an effective requirement of good faith, the meeting competition defense would swallow the general rule against price discrimination.

The rationale for having a meeting competition defense is the recognition that, as a matter of competitive reality, sellers will make sales on the best terms they can get in light of competitive offers (see *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 249). A "seller may well find it essential, as a matter of business survival, to meet [a competitive] price rather than to lose the customer" (*ibid.*). Moreover, sellers cannot be expected to have perfect knowledge of the offers received by buyers, and the statute thus tolerates less than perfect matching. *Gypsum, supra*, slip op. 26-28, 31-34 and n.32. But the purpose of accommodating the basic statutory requirement of uniform pricing to the demands of competitive reality and seller ignorance would not be served by allowing buyers to take advantage of sell-

er's good faith belief that a price reduction is necessary to meet competition. Buyers, after all, are not ignorant of the competing offers and do not need the protection offered to sellers. That is why, as the Court stated in *Automatic Canteen, supra*, 346 U.S. at 78 n.21, "[a] buyer knowing he is receiving a lower price cannot be said to be in the same position as a seller granting a lower price."

A & P's reading of the Act would allow a buyer to create a defense for itself by the very inducement that Congress sought to proscribe. It could persuade a seller that a discriminatorily low price was necessary to meet competition and then rely on the seller's mistaken impression as a defense. Such an interpretation of the Act would permit a buyer operating with full knowledge to profit by a seller's good faith mistake—a mistake that the buyer may well have induced or encouraged. This would defeat the essential purposes of Section 2(f). Yet, as the Court explained in *Automatic Canteen, supra*, 346 U.S. at 63, Section 2(f) "is a vital prohibition in the enforcement scheme of the Act." And, as *Automatic Canteen* demonstrates in connection with the cost justification defense, sellers and buyers may be treated differently under the Act if their different commercial roles make such a course appropriate.

Moreover, this Court has recognized that "sustained enforcement of § 2(f) * * * [may] serve to bolster the credibility of buyer's representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under

§ 2(b)." *Gypsum, supra,* slip op. 30 n.30. Effective enforcement of Section 2(f) would reduce sellers' perceived need for interseller price verification as a means of establishing a good faith meeting competition defense. Sellers would derive no comfort from the position A & P asserts, however, for if that approach were accepted buyers always would have an incentive to mislead sellers. Sellers then would need to rely on other methods of "verifying" buyers' representations and, as the Court held in *Gypsum,* some kinds of verification create the prospect of reduction in competition among sellers (slip op. 31-34). Accordingly, an interpretation of Section 2(f) that would allow buyers to take advantage of sellers' good faith would undermine antitrust concerns as well as the policies of the Robinson-Patman Act.

We submit, therefore, that Section 2(f) "prohibits inducing prices which would be illegal under [Section] 2(a) from the seller's point of view if the seller knew all that the buyer knows but has not told him." Curtis, *Buyer Liability Under the Robinson-Patman Act,* 42 A.B.A. Antitrust L.J. 345, 354 (1973). As Mr. Justice Clark, a member of the majority in *Automatic Canteen,* explained in the court of appeals' opinion in *Kroger Co.* v. *Federal Trade Commission,* 438 F. 2d 1372 (C.A. 6), certiorari denied, 404 U.S. 871, "[i]n order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer"

(*id.* at 1377). On the one hand, "a buyer may not be prosecuted for inducing discriminatory prices which it knows a seller may offer with impunity under section 2(b)" (*id.* at 1376). But, by the same token, "the seller's successful defense under § 2(b) cannot exculpate the buyer [if the buyer] knew that the prices offered by [the seller] * * * were not in fact within the defense of section 2(b)" (*id.* at 1377), for then the buyer cannot have the same "good faith" possessed by the seller. "To hold otherwise * * * would put a premium on the buyer's artifice and cunning in inducing discriminatory prices" (*ibid.*).[25]

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[25] A & P cites three cases (Br. 27 n.26) that it asserts discredit the result in *Kroger*. These cases are readily distinguishable and do not hold or even suggest that the finding of buyer's liability in *Kroger* was improper. In *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1191 (C.A. 5), the court of appeals decided that the Robinson-Patman Act was inapplicable because the repair service contracts at issue did not involve the sale of a commodity within the meaning of Section 2(a). In *Rutledge* v. *Electronic Hose & Rubber Co.*, 327 F. Supp. 1267, 1275 (C.D. Cal.), affirmed, 511 F.2d 668, 677 (C.A. 9), plaintiffs failed to present adequate proof that any price discrimination had occurred and, accordingly, there could be no Robinson-Patman liability for either buyer or seller. Finally, in *Harbor Banana Distributors, Inc.* v. *Federal Trade Commission*, 499 F.2d 395, 398-399 (C.A. 5), the court of appeals found that the challenged price and service terms did not beat competition and indeed may not even have been favorable enough to meet competition. Unlike the buyers in *Kroger* and the present case, the buyer in *Harbor Banana* did not accept an offer substantially better than the next best competitive bid, and the seller thus was not required to assert the "good faith" component of the meeting competition defense.

B. The Legislative History Of The Robinson-Patman Act Supports The Principle That Buyers Cannot Take Advantage Of Sellers' Good Faith (But False) Belief That Their Prices Simply Meet Competition

Our argument to this point has emphasized the structure of the Robinson-Patman Act and its judicial interpretation. The legislative history also supports the Commission's position that buyers charged with violating Section 2(f) cannot rely on their sellers' good faith meeting competition defense, where the buyers know that the sellers' beliefs are false and that the discriminatorily low prices offered not only met but substantially beat competition.

The Robinson-Patman Act was intended in major part to correct perceived abuses associated with the growth of chain stores at the time of its enactment in 1936. Large grocery chains in particular were accused of using their substantial buying power to extract special concessions from suppliers and thereby to upset conventional channels of merchandise distribution. See *Exxon Corp.* v. *Governor of Maryland*, *supra*, slip op. 14 n. 25; *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168-169; F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 8-14 (1962); W. Patman, *Complete Guide to the Robinson-Patman Act* 7-10 (1963); Fulda, *Food Distribution in the United States: The Struggle Between Independents and Chains*, 99 U. Pa. L. Rev. 1051 (1951); Federal Trade Commission, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935). The price discrimination provisions of the Clayton Act did not effectively

deal with the chain stores' practices because they did not reach price discriminations "made in good faith to meet competition." 38 Stat. 730.

The House Judiciary Committee thought that this language unwisely authorized sellers to cut their normal prices below prices offered by a competitor. Accordingly, the committee proposed the revised wording now found in Section 2(b) of the Robinson-Patman Act. Under this provision, sellers may rebut a charge of unlawful price discrimination by showing that their reductions in price to a particular customer were offered "in good faith to meet an equally low price of a competitor." As the Judiciary Committee explained, Section 2(b) "does not permit [a seller] to cut local prices until his competition has first offered lower prices, and then he can go no further than to meet those prices. * * * [T]he proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). The counterpart Senate bill retained the original Clayton Act meeting competition formula (see 80 Cong. Rec. 6426, 6433, 6435 (1936)), but the new and narrower House version, permitting sellers to meet only "equally low" competitive prices, prevailed at conference. The Conference Committee Report noted that the Senate's "language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act." H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936). See generally F. Rowe, *supra*, at 212-213.

In adopting the Robinson-Patman Act meeting competition proviso, then, Congress unmistakably sought to sanction only those discriminatory prices offered to meet equally low prices of a competitor.[26] The specific purpose of the statutory revision was to exclude from the proviso's protection price cuts that *beat* competitive offers. While proponents of legislative reform may of course question the wisdom of that decision, Robinson-Patman Act litigants cannot deny the congressional intent underlying Section 2(b). Congress left even the limited good faith defense in place only as an acknowledgement of the difficult competitive decisions that may face sellers (see page 29, *supra; Standard Oil Co.* v. *Federal Trade Commission, supra,* 340 U.S. at 249). In light of this background, it would be incongruous to permit a chain-store buyer to accept a non-cost-justified discriminatory price offer that it *knows* is substantially below any competing bid and thus could be justified (from the seller's point of view) only by good faith ignorance of the truth.[27]

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[26] This Court has recently confirmed that the current version of Section 2(b) "narrowed the good-faith defense that had previously existed." *Exxon Corp.* v. *Governor of Maryland, supra,* slip op. 13 and n.23. See also *Standard Oil Co.* v. *Federal Trade Commission, supra,* 340 U.S. at 247-249 and n.14.

[27] As this Court has said in a slightly different context, "[a] buyer knowing he is receiving a lower price cannot be said to be in the same position as a seller granting a lower price." *Automatic Canteen Co.* v. *Federal Trade Commission, supra,* 346 U.S. at 78 n.21. The Court on that occasion acknowledged that evidence regarding the meeting competition

A & P's real complaint then is with the Robinson-Patman Act itself. The Act was intended to limit the bargaining power of large buyers and thereby to curb the growing influence of chain stores. It "reflect[s] a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions." *Exxon Corp.* v. *Governor of Maryland*, *supra*, slip op. 14. Persons disagreeing with that policy choice must seek redress from Congress, not the courts.

C. Even If Misrepresentation By The Buyer Is A Prerequisite To Section 2(f) Liability Where The Seller Has A Good Faith Meeting Competition Defense, The Commission Correctly Found That A & P Violated The Statute In This Case

A & P argues (Br. 26-27) that even if the Court should accept the principle that a buyer may not take advantage of the seller's good faith meeting competition defense when the buyer knows the seller's beliefs to be false, the Court should limit the principle's application to cases in which the buyer affirmatively misrepresented the price offered by a competitor. In A & P's view, the Sixth Circuit's holding in *Kroger* (see pages 31-32, *supra*) covers only such cases.[28] Any

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defense may be more readily available to a buyer than to a seller. See 346 U.S. at 79 n.23.

[28] Notwithstanding A & P's contention, it is not at all clear that the *Kroger* court would have decided the present case differently than the court of appeals. *Kroger* plainly involved a lying buyer, and the court of appeals there did not explicitly consider what result it would have reached had this element of

other rule, A & P maintains, would discourage aggressive bargaining over prices to the detriment of competition. There are two answers to this position.

First, A & P engaged in misrepresentation, so it would remain liable under Section 2(f) even if this Court were to endorse its proposed modification of the *Kroger* rule. In September 1965, after Borden revised its private label bid and offered A & P's Chicago Unit $820,000 in annual savings on milk and dairy products, A & P told Borden to "sharpen your pencil a little bit because you are not quite there" (A. 117a-118a, 124a-125a, 1087a, 1151a-1152a). Interpreting this statement as an indication that its bid was not yet equal to or below its competitor's, Borden reduced its price somewhat further (A. 1087a). The administrative law judge found that "A & P gave false price information to Borden as to Bowman's competing bid. * * * A & P represented to Borden that Bowman's bid was lower than Borden's when, as a matter of fact, A & P itself understood Bowman's bid to be higher than Borden's" (A. 1152a).[29] The

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the buyer's conduct been missing. The Sixth Circuit's opinion in *Kroger* focused not so much on the buyer's misrepresentation as on the fact that the buyer knew that the seller's bid was considerably lower than necessary to meet competition. See 438 F.2d at 1376-1377.

[29] A & P also misrepresented facts concerning its request that Borden exclude glass gallons of milk and lowfat milk from the September 1965 revised bid. A & P told Borden that the competing bid did not include glass gallons and that, to permit a fair comparison, Borden should spread the proposed $820,000 annual savings over only the 11 milk and dairy products covered by Borden's first offer. In fact, Bowman's

Commission adopted this finding (A. 1193a-1194a, 1197a, 1199a n.3, 1200a n.5),[30] and the court of ap-

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bid did include glass gallons, and A & P sought to have the item eliminated from Borden's bid simply to avoid practical inconveniences associated with the sale of private label milk in glass containers (see pages 7-8, *supra*, and note 10).

[30] The Commission characterized A & P's misrepresentation as "not relevant" to the charge that A & P violated Section 5 of the Federal Trade Commission Act by failing to inform Borden that its bid was lower than Bowman's (A. 1200a n.5). Although the Commission agreed with complaint counsel that "A & P was the 'principal malefactor' in the negotiations with Borden" (A. 1211a), the Commission did not mention the misrepresentation in the portion of its opinion dealing with the charge that A & P knowingly received a discriminatory price, in violation of Section 2(f) of the Robinson-Patman Act (A. 1203a-1225a).

In the court of appeals, A & P initially did not discuss the misrepresentation, apparently because it believed the Commission had found the "sharpen your pencil" remark not relevant to the Section 2(f) count as well as the Section 5 count (see A & P Br. in the court of appeals at 28 n.28). In its reply brief, A & P attempted to refute the administrative law judge's findings concerning the misrepresentation; in addition, citing *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196, A & P argued that the court of appeals could not affirm the Commission in reliance on A & P's misrepresentation, because the Commission itself had not relied on the misrepresentation in reaching its decision (Reply Br. in the court of appeals at 4-6 and n.6). Believing that A & P is liable under Section 2(f) whether or not A & P technically lied to Borden, the court of appeals affirmed without referring to the "sharpen your pencil" remark.

If this Court should determine that, where the seller is not found to have violated Section 2(a), only a lying buyer may be found liable under Section 2(f), it should still affirm the Commission's decision on the basis of A & P's misrepresentation. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8. It would not be necessary to remand the

peals did not disturb it. A & P's misrepresentation was made before final agreement between the parties at a time when Borden remained free to withdraw its bid (see A. 1232a). Thus, A & P did lie about a competitor's offer, and if an affirmative misrepresentation is a prerequisite for A & P's liability under

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case to the Commission. The administrative law judge made an unmistakable finding of misrepresentation (A. 1087a, 1151a-1152a) and the Commission adopted that finding (A. 1197a, 1199a n.3). Notwithstanding A & P's effort in its court of appeals reply brief to minimize the significance of the "sharpen your pencil" remark, the misrepresentation was material because it indicated to Borden that the revised bid was nearly identical to (but not yet as low as) Bowman's competing offer, and indeed that further price cuts were required if Borden hoped to obtain A & P's private label business. Without elaborating on A & P's misrepresentation, the Commission ruled that A & P knowingly induced and received an unlawful discriminatory price; the result would not change if the Commission were to be instructed that liability could attach only if A & P lied in order to achieve its ends.

This Court's decisions in *Chenery* (see also 318 U.S. 80) do not compel remand where it is clear that the agency would reach the same result, were it to apply the proper legal standard, and where the agency has already explained its views and made adequate findings, supported by substantial record evidence, to sustain that result under the correct standard. As Judge Friendly has written, "*Chenery* does not mean that any assignment of a wrong reason calls for reversal and remand; this is necessary only when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result. In the absence of such a possibility, affirmance entails neither an improper judicial invasion of the administrative province nor a dispensation of the agency from its normal responsibility." Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L. J. 199, 211. See also *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (plurality opinion).

the circumstances here presented, the record adequately establishes that such a misrepresentation occurred.

Second, A & P's concern about the effect of the decision below on aggressive bargaining is unwarranted because the Commission's position, and the holding of the court in *Kroger*, do not "impose on buyers a duty to disclose competitive prices" (A & P Br. 18). Buyer liability under Section 2(f) depends on the conjunction of (1) a discriminatory price, (2) the buyer's knowledge that the price is unjustifiably discriminatory, and (3) actual harm to competition. A buyer that merely solicits bids and accepts the lowest offer would not violate Section 2(f); something more is necessary. The Robinson-Patman Act demands a showing of competitive injury as a prerequisite to a finding that a particular inducement or receipt of a discriminatory price is unlawful. The Act thus provides a built-in guarantee that enforcement of Section 2(f) will not produce anticompetitive effects. Here the course of dealings between A & P and Borden clearly established A & P's intent to obtain a discriminatorily low price, A & P's knowledge of the discrimination, and the lack of any justification for the discrimination.[31] The spectre of exposing buy-

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[31] To avoid liability under Section 2(f), buyers may seek assurance that the price offered to them is not discriminatory. A & P, apparently recognizing the efficacy of this technique, sought assurance from Borden that Borden's price was available to other buyers. Borden, however, did not provide the requested assurance, and A & P nevertheless accepted Borden's offer (see page 12 and note 13, *supra*).

ers to liability for engaging in ordinary business practices simply is not presented here.[32]

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[32] A & P contends (Br. 14, 18) that the Commission's disposition of Count I of the administrative complaint is inconsistent with its disposition of the Section 2(f) charge in Count II. Count I alleged that A & P's failure to inform Borden that Borden's final offer was substantially below all competing bids constituted an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act (see note 20, *supra*). The Commission dimsised this count, reasoning that an affirmative duty to disclose the terms of competing bids would be contrary to normal business practice and would not serve the public interest (Pet. App. 36a-39a). A & P maintains that the Commission's contemporaneous finding of liability for knowingly inducing and receiving an unlawful discriminatory price is based on the same conduct alleged in Count I and is equally contrary to the public interest. A & P is wrong. Proof of the Section 2(f) violation charged in Count II entailed much more than a simple showing that A & P silently accepted a bid below competition. While such a showing would have been adequate to sustain the Count I charge had the Commission embraced complaint counsel's view of Section 5, proof of the Section 2(f) violation also involved evidence that A & P, having actively induced Borden's bid, deliberately accepted a discriminatory price that it knew could not be cost-justified. The Commission's order under Section 2(f) does not require a buyer to inform a seller whenever the latter's bid beats competition. Buyers in general, and A & P in particular, remain free to accept any offer available to all customers of the seller, and they also remain free to accept even discriminatory price offers unless they know or have reason to know that the discrimination exists and cannot be cost justified.

II

THE COMMISSION ESTABLISHED BY SUBSTANTIAL EVIDENCE THAT BORDEN'S DISCRIMINATORY PRICE WAS NOT JUSTIFIED BY COST SAVINGS ACHIEVED IN SERVING A & P

A. Introduction

Section 2(a) of the Robinson-Patman Act gives sellers a defense to a charge of price discrimination if the discriminatorily low price makes "only due allowance" for cost savings achieved by a seller in serving a particular customer or customers. Section 2(b) of the Act provides that, once the Commission proves that price discrimination has occurred, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, held that a seller bears the entire burden of establishing a cost justification for a discriminatory price; the Commission presents a prima facie case simply by proving that a seller has sold to competing customers at different prices.

In *Automatic Canteen Co.* v. *Federal Trade Commission*, *supra*, the Commission's complaint charged a large buyer with knowingly receiving an unlawful discriminatory price, the effect of which may have been to injure competition. 46 F.T.C. 861, 895-896. Applying to the buyer the same allocation of burdens that *Morton Salt* had applied to sellers, the Commission then decided that, to rebut such a prima facie case, a buyer claiming a cost justification defense

must introduce evidence to show either that the discriminatory price was in fact cost justified or that the buyer had no reason to know it could not be cost justified. *Ibid.* Stressing the difference between a buyer's and a seller's access to information concerning the seller's costs, this Court reversed and held that, in a Section 2(f) proceeding, the Commission must present evidence to show the buyer knew or should have known a cost justification defense was unavailable (346 U.S. at 78-82).

A & P now contends (Br. 28-34) that both the Commission and the court of appeals have misinterpreted *Automatic Canteen.* A & P apparently does not contest the adequacy of the Commission's proof or its assessment of A & P's rebuttal evidence.[33]

A & P complains in particular (Br. 29), however, about the Commission's statement that, under *Automatic Canteen,* the "Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified" (Pet. App. 46a-47a). In A & P's view (Br. 29), this shows that the Commission proceeded on the assumption "that the F.T.C. can show that the buyer was 'reasonably aware' that prices were not cost justified * * * without adducing any evidence

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[33] The court of appeals correctly concluded (Pet. App. 16a, 23a-24a, 27a, 28a-30a) that the Commission's factual determinations on these points are supported by substantial evidence. There is no reason to review that decision here. See *Mobil Oil Corp.* v. *Federal Power Commission,* 417 U.S. 283, 309-310.

that cost justification was in fact lacking." The Commission, however, made no such assumption.

The Commission concluded that "complaint counsel fully established a *prima facie* case that A & P knew or should have known that the prices Borden charged it for private label products was [*sic*] not cost justified" (Pet. App. 52a). The court of appeals agreed that "the Commission showed, through substantial evidence * * * that A & P knew or reasonably should have known that the final price concessions it received from Borden were not cost justified" (Pet. App. 27a). Read in context, then, the "reasonably aware" phrasing to which A & P objects is merely a restatement of the "knew or should have known" formula advocated by A & P itself (Br. 28). Moreover, as a general rule in Section 2(f) proceedings the Commission is entitled to focus on the buyer's knowledge of the extent of possible cost justifications because as a logical matter, proof that a person knows a proposition to be true always rests on at least some evidence that the proposition is in fact true. This case illustrates that point. Much of the evidence introduced by the Commission to show A & P's knowledge of the lack of cost justification for Borden's bid served simultaneously to demonstrate that that bid could not have been cost justified. A & P thus is wrong in asserting that the Commission failed "to adduce any evidence of lack of cost justification" (Br. 28), and A & P is logically inconsistent in making that assertion while at the same time not challenging the Commission's conclusion that A & P knew or should have known that Borden's offer could not be cost justified.

B. *Automatic Canteen* Does Not Require The Commission To Present Direct Evidence Of The Seller's Costs

1. *The Automatic Canteen holding*

Two principal cases discuss the Commission's burden of proof in cost justification disputes.[34] The first is *Federal Trade Commission* v. *Morton Salt Co.*, *supra*. The Commission charged a seller with illegal price discrimination; the Court held that, under Section 2(b), the Commission need not produce evidence that the seller's quantity discounts are not cost justified. Rather, the Court said, a seller shown to have discriminated in price must bear the burden of proving cost justification. Specifically relying on *Morton Salt* (see 46 F.T.C. at 896), the Commission promptly held in *Automatic Canteen* that a buyer shown to have received a discriminatory price must bear a similar burden. The Commission reasoned that Section 2(b) does not distinguish between buyers and sellers and imposes equally on any alleged Robinson-Patman Act violator the burden of establishing a cost justification defense.

This Court disagreed, holding that "[c]onsiderations of fairness and convenience" require different evidentiary rules for buyers and sellers (346 U.S. at 78-79). Observing first that buyers ordinarily are not privy to information regarding their sellers' costs, and second, that the Commission enjoys a "broad

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[34] The term "burden of proof" is used here to comprehend both the burden of going forward with evidence and the burden of persuasion. See 9 J. Wigmore, *Evidence* §§ 2485-2489 (3d ed. 1940).

power of investigation and subpoena," the Court decided that the buyer does not bear "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" until the Commission first has made a demonstration sufficient to shift the burden (346 U.S. at 79; footnote omitted). The Court then summarized (346 U.S. at 80) ways in which the Commission could satisfy its evidentiary requirements after introducing proof that a buyer has received a discriminatory price.

> The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

Four important points need to be made about *Automatic Canteen*. First, the Court's decision represented a departure from the result that might have been expected solely on the basis of the statutory language. Section 2(b) provides that once a discrimination in price has been proven, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." This sentence seemingly applies not to sellers alone, but rather to all "per-

son[s] charged with a violation of [Section 2]," including buyers. Neither Section 2(b) nor any other provision in the Robinson-Patman Act suggests that different evidentiary rules should apply to buyers and sellers. The Court in *Automatic Canteen* acknowledged the argument that the inclusive language of Section 2(b) requires buyers to bear the same burden of showing cost justification as sellers (see 346 U.S. at 77-78); nevertheless, the Court held that, in a Section 2(f) proceeding, "[c]onsiderations of fairness and convenience" require the Commission initially to present some evidence on the lack of cost justification and the buyer's knowledge thereof. This ruling, itself a modification of the apparent commands of Section 2(b), should not now be interpreted to make the Commission's evidentiary burden even more onerous than under the court of appeals' reading of *Automatic Canteen.*

Second, the Court's 1953 decision concerned only the burden of coming forward with evidence, not the burden of persuasion. The Court emphasized this feature of its decision and explicitly eschewed any comment on the burden of persuasion (346 U.S. at 65, 74-75, 79, 81, 82). With respect to the latter issue, the Court cautioned that "different considerations may apply" (*id.* at 82). The critical sentences from the Court's opinion, reproduced above, must be read in this light. When the *Automatic Canteen* Court said that the Commission must show that any differences in methods of service or quantities purchased could not give rise to sufficient cost savings

to justify the price discount received by a particular buyer, the Court meant that the Commission must introduce at least enough evidence to make an initial demonstration of the buyer's knowledge of the lack of cost justification. That was as far as the Court needed to go in *Automatic Canteen*, for there the Commission had introduced no evidence at all about the seller's costs. The Court properly refrained from requiring the Commission to prove lack of cost justification by some specific quantum of evidence.

Third, in reversing the Commission's ruling in *Automatic Canteen*, the Court took pains to remark that the initial showing required of the Commission "should not be difficult" (346 U.S. at 79). The Court reinforced this point later in the same paragraph when it wrote that "the Commission must *only* show" that cost savings could not have been sufficient to justify price discounts and that the buyer should have known it (*id.* at 80; emphasis supplied). Given the Court's recognition of the difficulties associated with proving either the presence or absence of cost justification (346 U.S. at 68-69), its statements about the nature of the burden it was imposing on the Commission refute any implication that the Commission must satisfy unusually stringent evidentiary requirements under Section 2(f).

Fourth, the Court gave examples of the kinds of evidence that may be adduced by the Commission in fulfilling its evidentiary obligations. By its references to a buyer's trade experience, size of price discount as compared to cost savings, and possible rep-

resentations by a seller regarding the lack of cost justification (346 U.S. at 79-80 and n.24), the Court's opinion leaves little doubt that the Commission can establish a prima facie case of buyer's liability without introducing formal studies of a seller's costs.[35] Indeed, A & P concedes (Br. 30 n.30) that the Commission need not present a formal cost study in order to carry its burden of going forward under *Automatic Canteen*. Like the first three features of the Court's decision discussed above, this treatment of the evidence on which the Commission may rely in building a prima facie case under Section 2(f) demonstrates the limits of the holding in *Automatic Canteen*. The Court sought to fashion a reasonable allocation of the initial burden based on "[c]onsiderations of fairness and convenience" (346 U.S. at 78). It disavowed any intention to prevent future enforcement of the Robinson-Patman Act against large buyers.

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[35] As one prominent member of the antitrust defense bar has written, "*Automatic Canteen* made it clear that such cost studies are not needed when an inference can be drawn by the introduction of other evidence that cost justification is absent." H. Shniderman, *Price Discrimination in Perspective* 145 (1977). See also Applebaum, *Fundamentals of Buyers' Violation Under Robinson-Patman Act*, 39 A.B.A. Antitrust L. J. 869, 872-873 (1970).

2. *The Commission's development of procedures to implement Automatic Canteen*

After a period in which it issued few complaints under Section 2(f),[36] the Commission began to develop detailed allocations of the burdens of persuasion and introduction of evidence. Beginning with two 1959 decisions involving buying groups of automotive parts distributors, the Commission took the position that its burden of going forward under Section 2(f) may be satisfied by evidence that particular price discounts "necessarily bear relation to factors other than actual costs of production, sale or delivery" and that the buyers who received the discounts were or should have been aware of that fact. See *D & N Auto Parts Co.*, 55 F.T.C. 1279, 1300-1301, affirmed *sub nom. Mid-South Distributors v. Federal Trade Commission*, 287 F. 2d 512, 517-519 (C.A. 5), certiorari denied, 368 U.S. 838; *American Motor Specialties Co.*, 55 F.T.C. 1430, 1445-1446, affirmed, 278 F. 2d 225, 228-229 (C.A. 2), certiorari denied, 364 U.S. 884. The court of appeals in *Mid-South Distributors* confirmed that *Automatic Canteen* should not be read to require the Commission to introduce direct evidence of a seller's costs. The court stated (287 F. 2d at 517-518):

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[36] See F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 441-442 and n.107, 537 (1962); Applebaum, *supra*, note 35, 39 A.B.A. Antitrust L. J. at 873; Frey, *The Evidentiary Burden on Affirmative Defenses Under Section 2(f) of the Robinson-Patman Act:* Automatic Canteen *Revisited*, 36 Geo. Wash. L. Rev. 347, 353 (1967).

> [The *Automatic Canteen*] opinion reflects an awareness that this critical knowledge of the buyer as to both (a) the underlying facts constituting the asserted justification and (b) the conclusion that it would not legally constitute a justification may have to be established from indirect circumstantial inferences. Rarely will buyers have committed the crudities to permit categorical and direct proof.

See also *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 110 (C.A. 2), certiorari denied, 371 U.S. 824 (circumstantial evidence sufficient to prove buyer's knowledge in proceeding under Section 5 of the Federal Trade Commission Act).

Since *Automatic Canteen*, the leading decision dealing with a buyer's cost justification defense is *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (C.A. 9), reversed on other grounds after limited grant of certiorari, 390 U.S. 341. There, as here, the Commission's initial case depended primarily on trade experience and the buyer's knowledge rather than on proof of the seller's actual costs. There, as here, the buyer—pointing out that it purchased especially large quantities—contended that cost savings achieved by its suppliers were sufficient to justify the price differential proved by the Commission. Assuming *arguendo* that the quantity differences were sufficiently large "to cast on the Commission the burden of showing that petitioner knew or should have known that [the price discounts] still could not be 'cost-justified" (359 F. 2d at 364), the court of appeals ruled that the Commission carried its additional burden. The

court found it "immaterial" that the Commission "did not prove the costs of the suppliers" (*ibid.*). Under *Automatic Canteen*, the court held, the Commission is free to rely on inferences drawn from circumstantial evidence in the record in order to show that Fred Meyer knew or should have known that the discriminatory terms and prices it received were not cost justified (*id.* at 365).[37] See also *National*

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[37] A & P makes much of the fact that "[t]he Ninth Circuit in *Fred Meyer* did not indicate any intention to modify its earlier decision in *Alhambra* [*Motor Parts* v. *Federal Trade Commission*, 309 F.2d 213 (C.A. 9)]" (Br. 34 n.36). In *Alhambra* the court of appeals paraphrased *Automatic Canteen* in terms thought by A & P to impose a properly stringent burden on the Commission. But *Alhambra* does not assist A & P, and to the extent it may be inconsistent with *Fred Meyer*, the later case should control.

Alhambra involved the Commission's challenge to a price advantage received by a buying group composed of wholesale distributors of automotive parts. The buying group performed warehousing services for its members and thus allegedly reduced the costs incurred by manufacturers in selling to members of the group. When charged with receiving an unlawful discriminatory price in violation of Section 2(f), the buying group's members asserted a cost justification defense on the basis of the group's warehousing function. The Commission sustained the Section 2(f) charge, affirming the hearing examiner's initial decision without opinion. 57 F.T.C. 1007, 1025. The examiner, in turn, concluded that the buying group's members "were successful operators in a highly competitive market and knew the facts of life so far as the automotive parts market was concerned and knew that no cost justification could be maintained by the sellers since no difference in the cost of manufacture, sale or delivery was involved" (*id.* at 1020). This conclusion, however, was unsupported by any specific consideration of the asserted cost justification defense. In particular, the examiner's decision did not refer to any

Parts Warehouse, 63 F.T.C. 1692, 1730-1736, affirmed *sub nom. General Auto Supplies, Inc.* v. *Federal Trade Commission*, 346 F. 2d 311 (C.A. 7), certiorari dismissed, 382 U.S. 923.

The court of appeals in this case wrote (Pet. App. 26a) that *Automatic Canteen* requires the Commission "to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified * * *."[38] According to A & P, this formulation, closely resembling the language used in *Fred Meyer* (see 359 F. 2d at 364), relieves the Commission of its responsibility to introduce evidence that the discriminatory prices in fact could not be cost justified. We disagree.

The court of appeals' reference to the Commission's burden of going forward with evidence that a buyer knew or should have known that a discriminatory price could not be cost justified is simply a convenient shorthand for the *Automatic Canteen* test. The court of appeals' emphasis on the buyer's knowledge reflects a realization that proof of such knowledge in-

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evidence regarding the warehousing function performed by the buying group for its members and the possibility of resulting cost savings to automotive parts manufacturers. Following *Automatic Canteen*, the court of appeals held that the Commission had not carried its burden of coming forward with sufficient evidence concerning cost justification. In the present case, by contrast, the Commission explicitly found that Borden's discriminatory price was not cost justified (Pet. App. 41a, 48a-49a).

[38] See also *American Motor Specialties Co.* v. *Federal Trade Commission, supra*, 278 F.2d at 228; *American News Co.* v. *Federal Trade Commission, supra*, 300 F.2d at 111.

evitably entails proof of the fact known, namely, that the discriminatory price could not be cost justified. See 2 J. Wigmore, *Evidence* § 267, at 92 (3d ed. 1940) ("There is however a large class of cases where * * * Knowledge * * * is of service only *evidentially, i.e.* as forming *a second step of inference to some other fact* which forms the ultimate object of proof" (emphasis in original)). Knowledge ordinarily is derived from the underlying facts.[39] We therefore may accept, for purposes of this case, A & P's argument that, under *Automatic Canteen*, the Commission must introduce some evidence of both the lack of cost justification and the buyer's knowledge thereof (see A. 1127a-1130a, 1233a).[40] But that does not help A & P for, as this case and *Fred Meyer* demonstrate, the same evidence may serve both purposes, and that evidence need not be direct evidence of the seller's costs. As the Court

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[39] See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 416 and n.29; *Leary* v. *United States*, 395 U.S. 6, 46 n.93; *United States* v. *Seidman*, 503 F.2d 1027 (C.A. 9); *United States* v. *Joly*, 493 F.2d 672, 675-676 (C.A. 2).

[40] The court of appeals commented that the Commission had arrived at its finding of liability under Section 2(f) "without a square holding as to the factual absence of cost justification" (Pet. App. 25a). This comment overlooked the fact that the Commission expressly adopted the ALJ's finding that Borden's price discrimination could not be cost justified (Pet. App. 41a, 48a-49a; A. 1109a-1110a). The Commission itself stated explicitly that "service savings to Borden could not in any way justify the price differentials" (Pet. App. 48a). In short, the Commission did not ignore its burden under *Automatic Canteen*, and the court of appeals' remark can best be explained either as a simple oversight or as a reference to the absence of a formal cost study by the Commission.

in *Automatic Canteen* plainly indicated (346 U.S. at 79-80), formal cost studies are not required to prove a prima facie case under Section 2(f). Rather, the *Automatic Canteen* evidentiary requirements may be satisfied by inferences drawn from circumstantial evidence in the record.

This is a salutary rule. A requirement that the Commission produce direct evidence of a seller's costs or a formal cost study would unreasonably burden enforcement of Section 2(f). Even if the Commission could obtain the necessary data, the commitment of government resources necessary to establish a single violation would be so great that proceedings against buyers under the Robinson-Patman Act would come to a standstill. Such a result would be antithetical to the Act's primary purpose, the correction of abuses associated with the growth of large chain store buyers (see page 33, *supra*). *Automatic Canteen* never contemplated such a development. The Court held that, before the Commission has introduced any evidence regarding lack of cost justification and the buyer's knowledge thereof, "[c]onsiderations of fairness and convenience" preclude any requirement that the buyer introduce such evidence. These considerations no longer control, however, once the Commission has made a prima facie showing that a discriminatorily low price could not have been cost justified and that the buyer knew it.

Where the Commission has made such a showing, based on circumstantial evidence, it is reasonable to require that the buyer come forward with some re-

buttal. Although buyers typically do not enjoy direct access to seller's cost figures, they have, by definition, been parties to the transactions in which they received discriminatory prices, and frequently they have maintained long-standing business relationships with the sellers involved. They have access to discovery under the Commission's rules. In addition, buyers' industry experience generally places them in a better position than the Commission to identify particular areas in which sellers may have achieved cost savings.

There is, moreover, nothing unusual in the Commission's ruling that, once a prima facie case has been presented, the burden of coming forward with evidence shifts to the buyer. This is merely an example of accepted practice under the Administrative Procedure Act. Section 7(c) of the Act, 5 U.S.C. 556(d), states: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The legislative history of this provision "indicates that it allocates the burden of going forward rather than the burden of ultimate persuasion" and that the burden of introducing evidence may shift once the agency has presented credible and credited evidence in support of its position. See *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency*, 548 F. 2d 998, 1004, 1013-1015 (C.A.D.C.), certiorari denied *sub nom. Velsicol Chemical Corp.* v. *Environmental Protection Agency*, 431 U.S. 925; *Old Ben Coal Corp.* v. *Interior Board of Mine Operation Appeals*, 523 F. 2d 25, 30 (C.A. 7);

National Labor Relations Board v. *Mastro Plastics Corp.*, 354 F. 2d 170, 176 (C.A. 2), certiorari denied, 384 U.S. 972. As the report of the Senate Judiciary Committee stated:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.

S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945). See also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946); Attorney General's Manual on the Administrative Procedure Act 75 (1947).

C. The Commission Introduced Sufficient Evidence That Borden's Private Label Prices To A & P Were Not Cost Justified

It remains only to recount briefly the evidence introduced by the Commission to show the lack of cost justification for Borden's bid.

1. First and foremost among this evidence are Borden's statements to A & P that the September 1965 bid was offered on a meeting competition basis only and could not be justified on any other ground (see pages 7-9, *supra*). To be sure, this Court observed in *Automatic Canteen* that neither buyers nor the Commission need always credit fully such comments by a seller. The Court said (346 U.S. at 80 n.24): "[T]he Commission may consider that a seller stating that a price would be unlawful might

in some situations be puffing rather than stating anything which a buyer can rely on or should be charged with." Nonetheless, Borden's statements that its private label prices could not be cost justified are surely some evidence that in fact a cost justification defense was unavailable.

This view seems especially compelling in light of *Automatic Canteen's* teaching that "the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices" (346 U.S. at 79).[41] Of course, as this quotation illustrates, Borden's statements are highly relevant in proving A & P's knowledge that the private label prices could not be cost justified. See also *Mid-South Distributors* v. *Federal Trade Commission*, *supra*, 287 F. 2d at 519; Frey, *supra*, 36 Geo. Wash. L. Rev. at 366. But that does not make them irrelevant to the issue of the actual lack of cost justification. There is no support for

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[41] See also the statement of Representative Utterback, the leading House manager, in presenting the conference committee report on the bill that became the Robinson-Patman Act (80 Cong. Rec. 9419 (1936)):

> [Section 2(f)] affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.

A & P's attempt to bifurcate the Commission's evidence into two mutually exclusive categories, one relevant only to the buyer's knowledge, the other only to the actual cost justification for the seller's bid.

2. In addition to Borden's statements about the impossibility of justifying its bid on any ground other than meeting competition, the Commission introduced cost data supplied by Borden to A & P during negotiations in July and August 1965 (A. 60a-64a, 296a-299a, 598a-636a, 641a). Comparison of these cost figures with the offer ultimately accepted by A & P (A. 738a-765a, 785a-789a) reveals that Borden's costs on quarts of milk were almost identical to the price received by A & P and that Borden's costs on gallons and half-gallons were significantly higher than the prices received by A & P on those items (see Pet. App. 16a, 50a-51a; A. 1081a, 1083a, 1102a). A & P characterizes the cost figures presented by Borden during negotiations as "sales tools" (Br. 6, 32), and the Commission conceded that the data "may not be entirely accurate" (Pet. App. 50a).[42]

Again, however, the figures are evidence that the substantial price discount obtained by A & P could not be justified on the basis of cost savings to Borden.[43] Whether Borden's salesmen "understated their

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[42] A & P's Chicago Unit Dairy Buyer testified, however, that he found the Borden officials who prepared the cost figures "honest and forthright" (A. 291a).

[43] A & P notes (Br. 5 n.7) an alleged inconsistency in the projected profit figures reported by Borden in May and July

anticipated profit" (A & P Br. 5) has little bearing on the case; the question, rather, is whether Borden achieved unique cost savings in serving A & P in order to justify the significantly lower prices enjoyed by A & P alone. Even if a prudent business person in A & P's position would have suspected that Borden's profits under the private label agreement would be higher than Borden was willing to admit, Borden's cost figures do indicate that Borden did not expect cost savings equivalent in value to the price discount received by A & P.[44]

1965. The two Borden documents cited by A & P (A. 574a-589a, 598a-618a) are not directly comparable, however, because the later private label price quotation was the first one based on calculations reflecting A & P's willingness to accept reduced service terms. This is at least a partial explanation for the higher gross profit "per point" stated in the July 1965 quotation. Indeed, the differences between Borden's May and July figures demonstrate the inaccuracy of A & P's claim that all of Borden's cost figures "used total historical costs for full service delivery to all customers from Borden's obsolete Chicago dairy plant" (Br. 5).

A & P also maintains (Br. 12) that, in attempting to evaluate the relationship between Borden's bid and its costs, it relied heavily on the so-called "2-2-2" formula derived from previous experience in New York State. But Borden's cost figures plainly indicated that wage rates in Chicago were higher than in New York State (A. 638a, 641a), and the administrative law judge found that application of the "2-2-2" formula in the Chicago area would result in an underestimation of Borden's costs (A. 1083a, 1104a-1105a). A & P's continued reliance on the formula, even after being apprised of the higher Chicago wage rates, helps to show the company's willingness to accept a price that could not be cost justified.

[44] In addition to the cost figures presented to A & P during the negotiation period, Borden also prepared data reflecting

3. The Commission submitted evidence drawn from actual trade experience in the Chicago area after the commencement of Borden's private label service to A & P. Other customers who accepted the limited service option made available by Borden in January 1966 did not receive a discount as large as A & P's, even though Borden's only possible additional saving in serving A & P (elimination of the cost of advertising the Borden brand) could not have justified the remaining difference in price (A. 1105a-1106a; Pet. App. 48a, 51a).[45]

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its actual experience during the first several months under the private label agreement (A. 804a-806a, 836a-839a). The administrative law judge apparently believed that this material contributed persuasively to complaint counsel's showing that the price discounts received by A & P could not be cost justified (A. 1125a-1127a). Correctly stating that a formal cost study is unnecessary to the establishment of a prima facie case under Section 2(f) (Pet. App. 47a; see pages 48-49, *supra*), the Commission found that Borden's studies were not "sufficiently reliable" and hence "did not decide whether Borden's internal cost calculations * * * are accurate" (Pet. App. 54a n.31). Even if Borden's post-agreement studies are completely ignored, the Commission presented sufficient evidence to satisfy *Automatic Canteen's* requirement of a showing that a discrimination in price could not have been cost justified. Accordingly, A & P's declaration (Br. 28 n.28) that there was no formal Borden cost study, though accurate, does not detract in any way from the result reached by the Commission and the court of appeals.

[45] In another attempt to embroil this Court in the factual controversies properly resolved below, A & P cites testimony of its witnesses to the effect that the great majority of A & P's competitors in Illinois and Indiana received more service than A & P (Br. 31 n.31). The important point, however, is that even those stores that did *not* receive more service than

In May 1966, when Borden attempted to invoke a provision in the private label contract calling for price increases based on increases in seller's costs, A & P balked and accepted the proposed increases only on its purchases of Borden label products (A. 1107a; Pet. App. 52a). Ten months later, when A & P finally did agree to a private label price increase based on Borden's increased costs, that increase was less than 60 percent of the increase already accepted by Borden's other customers (A. 1090a, 1107a; Pet. App. 52a; see pages 14-15, *supra*). These factors together demonstrate that the discount received by A & P on private label milk and dairy products could not have been justified by Borden's cost savings in processing and delivering the private label line.

4. If further evidence of the lack of cost justification is necessary, it can be found in Borden's refusal to provide the customary letter of availability when requested to do so by A & P (see page 12 and note 13, *supra*). Had Borden's final bid been cost justified, Borden would have had every reason to make

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A & P paid higher prices than A & P. Moreover, Borden's delivery foreman in the Gary-Hammond area of Indiana, the only witness with firsthand knowledge of the comparative services rendered in that locale, testified that most of A & P's large competitors received the same service as A & P, except that the disfavored competitors did not preorder (A. 190a-196a). He further testified that preordering generally did not make a significant difference because Borden's drivers knew from experience the approximate quantities of milk that each store would need each day and because special deliveries were made to A & P and other stores if they needed extra milk (A. 194a, 195a-196a).

the same terms available to other customers. When Borden would not assure A & P that the private label prices were proportionately available to A & P's competitors, Borden itself provided evidence that A & P's discount could not be cost justified.

5. In short, the situation in this case is vastly different from that reviewed by the Court in *Automatic Canteen*. There, the hearing examiner and the Commission made no findings concerning the absence of cost justification and the buyer's knowledge thereof. Here, the administrative law judge and the Commission made square findings on both points, and those findings are supported by substantial evidence.[46]

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[46] In *Automatic Canteen* the Commission took the position that a prima facie case under Section 2(f) could be established without any evidence whatever regarding cost justification or the buyer's knowledge. In rejecting this view, the Court did not need to specify the precise evidentiary burden the Commission must carry. The Court's opinion focused on the statutory requirement that, in order to violate Section 2(f), a buyer must "knowingly" induce or receive an unlawful discriminatory price. The Court offered several examples of the kinds of evidence that would establish "a sufficient degree of knowledge to provide a basis for prosecution" (346 U.S. at 80). The Commission therefore believes that, in an appropriate case, the approach of *Automatic Canteen* would allow the Commission to satisfy its burden simply by showing that the buyer knew or should have known that the prices it received could not be cost justified. See *Suburban Propane Gas Corp.*, 73 F.T.C. 1269. The Court need not resolve that issue here, because the Commission's evidence showed both the buyer's knowledge and the actual lack of cost justification. If, in a future case, evidence of knowledge does not also establish lack of cost justification, it may become necessary to decide whether the lesser showing is sufficient under *Automatic Canteen*.

Under these circumstances, the Commission properly shifted to A & P the burden of rebutting the Commission's prima facie case.

The "[c]onsiderations of fairness and convenience" that motivated the Court in *Automatic Canteen* support the Commission's procedure in this case. When the Commission has made a circumstantial showing as strong as that summarized above, it is reasonable to require the buyer to come forward with some evidence in its defense. As the court of appeals concluded (Pet. App. 27a),

> [t]o here require the Commission to submit a formal cost study or other cost-measuring analysis, in addition to the testimony or other evidence it has already adduced, would go far towards foreclosing the possibiilty of a § 2(f) proceeding even where all significant indications and factors point to the absence of cost justification and the likelihood of illegal price discriminations.

A & P argues (Br. 31-33) that the Commission erred in ruling that, once a prima facie case of buyer's liability under Section 2(f) has been established, the buyer must submit a cost study if it wishes to show that the prices it received were actually cost justified (see Pet. App. 47a, 54a). A & P contends that this rule places too great a burden on the buyer, because, by requiring proof of the seller's costs, it obligates the buyer to produce information available only to the seller. But the Commission explicitly stated that it "would be willing to lower the standard if it was demonstrated that the buyer could not ob-

tain the necessary records from the seller to undertake the study" (Pet. App. 55a). Moreover, as the Commission found (*ibid.*), A & P experienced no such problems in this case.[47] Although A & P was able to obtain from Borden the documents it needed, the cost studies prepared by A & P were defective and did not satisfactorily rebut the Commission's prima facie case (A. 1130a-1151a; Pet. App. 23a-24a, 54a).

A & P's argument seems to proceed on the premise that because A & P failed to carry its evidentiary burden, that burden was wrongly imposed. *Automatic Canteen* did not hold, however, that no buyer should be subject to evidentiary requirements it cannot meet in a particular case. Some buyers will fail

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[47] A & P is inaccurate in asserting (Br. 14, 32) that it was forced to reconstruct Borden's costs "over eight years after the challenged events," at a time when Borden "had little incentive to help A & P * * *." While administrative hearings did not begin until 1973, A & P knew of the Commission's investigation as early as 1967 (A. 1175a-1176a, 1230a-1231a). The complaint was issued in October 1971, several months before A & P terminated Borden as its supplier of milk and dairy products. In addition, Borden was not without incentive to help A & P prepare its case. Borden was named in Count III of the complaint, charging a combination to stabilize and maintain milk prices, in violation of Section 5 of the Federal Trade Commission Act (see note 20, *supra*), and was a party to the administrative proceeding. A Commission decision against A & P therefore threatened to trigger private treble damages actions against Borden, either by its own injured competitors or by disfavored customers who were competitors of A & P. Similarly, Commission findings unfavorable to A & P, threatened Borden with adverse evidentiary effects in such private treble damages suits, either through collateral estoppel or under Section 5(a) of the Clayton Act, 15 U.S.C. 16(a).

to show cost justification because there is no justification to be shown. A failure of this sort cannot mean that someone else should have borne the burden; it means, instead, that a finding of buyer liability is proper.

The Court in *Automatic Canteen* did not intend to render Section 2(f) nugatory. It merely sought to strike a balance of "fairness and convenience" that would require the Commission to go forward with some evidence of the lack of cost justification and the buyer's knowledge thereof. The Commission did so in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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